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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 337.

BOSTON PRESSED METAL CO., *Petitioner*,

v.

THE UNITED STATES, *Respondent*.

BRIEF ON BEHALF OF PETITIONER.

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I.

OPINION OF THE COURT BELOW.

The opinion of the Court of Claims has not been officially reported. It was rendered by the Court below on June 2, 1930, and will be found printed in the record at pages 8 and 9.

II.

JURISDICTION.

The jurisdiction of this court is invoked under Section 3(b) of the Act of February 13, 1925 (43 Stat. 926).

The final judgment of the Court of Claims was entered on June 2, 1930 (R. 10). Application for writ was presented August 8, 1930 (R. 1), and granted on October 20, 1930.

The suit brought in the Court of Claims is for the recovery of an overassessment of corporation income and profit taxes collected for the year 1918, illegally retained by the defendant, jurisdiction of which is conferred upon the Court of Claims by Section 145 of the Judicial Code and Section 3226 of the Revised Statutes.

III.

STATEMENT OF THE CASE.

The petitioner, a corporation, filed its Federal income tax return for the year 1918 and paid taxes shown thereon in the amount of $30,532.77. In 1921 an additional tax of $13,299.65 was assessed against it. This assessment was not paid. On August 27, 1924 the Commissioner of Internal Revenue allowed an overassessment to the petitioner for the year 1918 in the amount of $22,530.14 of which $13,299.65 was applied as an abatement of the prior assessment in the same amount, $5,938.11 was credited against an additional tax for the year 1920 and the balance, $3,844.94, the amount involved in this proceeding, was credited against a tax claimed to be due from the petitioner for the year 1917.

The return for 1917 was filed on March 30, 1918. On January 7, 1921 the Commissioner of Internal Revenue made an additional assessment for the year 1917. On February 24, 1921 the petitioner filed a claim for abatement covering this additional assessment and also the additional assessment of $13,299.65 for 1918. The 1918 assessment was later abated in full.

The balance of the overassessment of $3,844.94 for the year 1918 was an overpayment and was credited against the outstanding assessment for the year 1917, above referred to, on January 7, 1925, a date more than five years after the filing of the return for 1917.

The petitioner filed suit in the Court of Claims asking judgment for $3,844.94, the overpayment found and allowed by the Commissioner of Internal Revenue for the year 1918 on the ground that the credit of that amount against the alleged tax for the year 1917 was void because it was made after the expiration of the statute of limitations on collection of taxes for the year 1917.

The Court held that although the credit was made after the statute of limitations had expired with reference to the taxes for 1917, no recovery would be allowed because of the provisions of Section 611 of the Revenue Act of 1928.

IV.

STATUTES INVOLVED.

The pertinent provisions of law are Sections 607, 609(a) and 611 of the Revenue Act of 1928 reading as follows:

"Sec. 607. Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid (whether before or after the enactment of this Act) after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim."

"Sec. 609(a). Any credit against a liability in respect of any taxable year shall be void if any payment in respect of such liability would be considered an overpayment under Section 607."

"Sec. 611. If any internal-revenue tax (or any interest, penalty, additional amount, or addition to such tax) was, within the period of limitation properly applicable thereto, assessed prior to June 2, 1924, and if a claim in abatement was filed, with or without bond, and if the collection of any part thereof was stayed, then the payment of such part (made before or within one year after the enactment of this Act) shall not be considered as an overpayment under the provisions of Section 607, relating to payments made after the expiration of the period of limitations on assessment and collection."

V.

SPECIFICATION OF ERRORS TO BE URGED.

The errors which the petitioner urges as grounds for the reversal of the decision of the Court of Claims are:

1. The Court below erred in finding and holding that Section 611 of the Revenue Act of 1928 is applicable to this case.

2. The Court below erred in holding that the col-

lection of tax was "stayed" within the meaning of the Section 611 of the Revenue Act of 1928.

3. The Court below erred in failing to find and hold that the application of Section 611 to this case will render that Section unconstitutional.

THE ARGUMENT.

Summary of Argument.

A. The provisions of Section 611 of the Revenue Act of 1928 do not apply to this case for the following reasons:

1. The 1918 overpayment sought to be recovered was not covered by a claim for abatement.
2. They are not applicable to credits.
3. The collection of no part of the tax for 1917 was "stayed" by a claim for abatement or otherwise.

B. The application of Section 611 of the Revenue Act of 1928 to this case would render it unconstitutional for the following reasons:

1. The power conferred on Congress by the Sixteenth Amendment is limited to the laying and collecting of taxes on income.
2. The petitioner would be deprived of its property without due process of law and without just compensation in violation of the Fifth Amendment.

VI.

THE ARGUMENT.

The Provisions of Section 611 of the Revenue Act of 1928 do not Apply to This Case.

1. *The 1918 overpayment sought to be recovered was not covered by a claim for abatement.*

The petitioner brought suit in the Court of Claims to recover an overpayment in the amount of $3,844.94 allowed by the Commissioner of Internal Revenue for the year 1918. There was no claim for abatement filed for the year 1918 which was applicable to the amount of this overpayment. As there was no claim for abatement filed covering the tax sought to be recovered, Section 611 of the Revenue Act of 1928 can have no effect. By its express words it relates only to cases in which "a claim for abatement was filed * * *."

2. *Section 611 does not apply to a "credit" made after the expiration of the statutory period of limitations.*

The overpayment allowed the petitioner for the year 1918 was not refunded to it, but was credited against an assessment made for the year 1917. At the time the credit was made it was too late to collect the assessment for the year 1917 because of the provisions of Section 277 (a) (2) of the Revenue Act of 1924. Bowers v. New York & Albany Lighterage Co., (273 U. S. 346); Russell v. United States, (278 U. S., 181).

The offsetting of the allowable overpayment for 1918 against the barred assessment for 1917 did not give the Government the right to retain the amount allowed as an overpayment. The taxpayer should be permitted to recover the overpayment already al-

lowed. Peerless Paper Box Mfg. Co. v. Routzahn, (22 Fed. (2d) 459).

In L. O. 1095 (1-I C. B. 313) the Solicitor of Internal Revenue stated:

> "The Government itself insists on the benefit of the statute of limitations and holds that a refund due a taxpayer cannot be applied on a later tax when the amount refundable is barred by the statute. It is believed both in good conscience and by legal right the same rule must apply when it works to the advantage of the taxpayer."

The Court below held that the ex parte withholding of an overpayment should be considered the same as a voluntary payment by the petitioner. There is much difference between an ex parte withholding by the collector and a voluntary payment by the taxpayer and the Revenue Act of 1928 treats with them separately and differently. If Congress had intended a void credit to constitute a payment as the Court below held, there was no necessity for Section 609(a). If the *void credit* was a *payment* it would already have been under the express language of Section 607, and Section 609(a) would be meaningless. Consequently, to adopt the interpretation of the Court below would be to impute to Congress the use of superfluous language. This the Courts will not do.

> Platt v. Union Pacific Railroad Co., (99 U. S. 48).
> United States v. Lexington Mill Elevator Co., (232 U. S. 399).
> Wiborg v. United States, (163 U. S. 632).

Every word of a statute is to be given effect. Wilmot v. Mudge, (103, U. S., 217); Early v. Doe ex Dem Homans, (16 How., 610).

If Congress had intended void credits to have been modified by Section 611, it would have either used the word "credited" in Section 607 and omitted Section 609(a) entirely, or it would have inserted in Section 609 a qualification referring to and incorporating therein the substance of Section 611—for example by the use of the clause "except as provided in Section 611". The failure of Congress to follow either one of these two courses is highly persuasive that the form of the statute in this connection was deliberate and that it was intended that Section 609(a) should be given its literal effect and should not be modified in any manner by Section 611. Added force is given to this conclusion from the circumstances that Section 611 follows in order both Section 607 and Section 609.

That Congress intended to distinguish between actual payments by the taxpayer (covered by Sections 607 and 611) and mere *ex parte* credits by the Commissioner (covered by Section 607 and 609(a)) may be the more easily accepted because, it is submitted, Congress ought to have intended this distinction. The situation of a taxpayer who voluntarily pays a tax, is entirely different from the situation of a taxpayer whose money, in the hands of the Commissioner and representing an acknowledged overpayment for one year, is summarily applied by the Commissioner against an alleged tax liability of another year. In the former case the taxpayer has his opportunity to contest the correctness of the tax by an appeal to the Board of Tax Appeals before payment. In the later case the taxpayer is absolutely helpless, being without even the opportunity to argue his case to the Commissioner or to point out the illegality of the proposed action to the Board of Tax Appeals.

It should be noted that the respondent must rely not upon any express statutory provision but upon an implication. To sustain the Court below it must be argued that the express provision of Section 609(a) carries the implication that a credit against a liability, payment of which would be an overpayment under Section 607, shall not be void and that the phrase "under Section 607" should be construed as *"under Section 607 as limited by Section 611."* In other words, the respondent's case requires that the court should imply a negative provision where the statute merely expresses a positive provision.

If Congress had intended a void eredit to fall under the terms of Section 611 it would have done one of two things—either added to Section 609(a) "except as provided in Section 611" or have inserted the word "credited" in Section 607 and omitted Section 609(a) from the law. It has done neither and we submit that this shows a clear intent to differentiate between payments and credits.

3. *The collection of no part of the tax for 1917 was "stayed" by a claim for abatement or otherwise.*

There was no "stay" of the collection of the tax sought to be recovered. The Court below did not find that the collection of the tax for 1918 was "stayed", and erroneously considered this case as if it were a suit to recover the 1917 tax against which the credit was applied, but even on that theory Section 611 could have no application in this case for, while there was a claim for abatement filed for the year 1917, *there is no finding nor any facts from which the court could have found that "the collection of any part thereof (1917 tax) was stayed".*

Assuming (for the sake of argument only) Section 611 could be considered as modifying Section 609, on the facts in this case Section 611 can not be applied because there is neither a finding nor facts to show that collection of the 1917 tax was "stayed" by a claim for abatement or otherwise.

SECTION 611, IF CONSTRUED TO APPLY, WOULD BE UNCONSTITUTIONAL.

This case has been assigned to follow other cases involved related questions, including that of the application and constitutionality of Section 611 of the Revenue Act of 1928. As those questions have been comprehensively briefed in the other cases counsel begs leave to refer to those briefs in lieu of repeating arguments already made to this Honorable Court.

CONCLUSION.

In conclusion, it is respectfully submitted that the decision of the Court of Claims should be reversed.

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